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No. 09-231

IN THE
Supreme Court of the United States

CHARLES BROWN, *et al.*,
Petitioner,

v.

DAVID HOVATTER, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari
To the United States Court Of Appeals
For the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DOUGLAS F. GANSLER
Attorney General of Maryland

STEVEN M. SULLIVAN*
KATHLEEN A. ELLIS
GRANT D. GERBER
Assistant Attorneys General
200 St. Paul Place
Baltimore, Maryland 21202
(410) 576-6324

Attorneys for Respondents
* *Counsel of Record*

QUESTION PRESENTED

Did the court of appeals correctly conclude that a long-standing State enactment limiting funeral business licenses to individual applicants, rather than corporations, does not violate the dormant Commerce Clause, where there was no showing that the requirement either discriminated against or unjustifiably burdened interstate commerce?

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STATEMENT OF THE CASE

Proceedings Below

After repeatedly and unsuccessfully lobbying the Maryland General Assembly for legislative action, four individuals, each of whom operates a funeral or cemetery business in Maryland, brought this lawsuit challenging the constitutionality of a seventy-year-old provision of a State statute, which generally requires that a mortician or funeral director license be held by an individual rather than a corporation. The complaint asserted equal protection, due process, and dormant Commerce Clause challenges to the limits on corporate licenses set forth in the Maryland Morticians and Funeral Directors Act (the "Act"), codified at Md. Code Ann., Health Occupations §§ 7-101 to 7-602 (2005 Repl. Vol. and 2008 Supp.); *see* §§ 7-309(a), 7-309(b). App. 100-01. Separate counts of the complaint also asserted equal protection and due process claims with respect to § 7-310 of the Act, which requires that each licensed funeral establishment must be owned and operated by at least one licensed mortician or funeral director. App. 102-03.

On cross-motions for summary judgment, the district court rejected all of the equal protection and due process claims. App. 46-57. As to the dormant Commerce Clause claim, the district court determined that the Act does not discriminate against interstate commerce in either its purpose or effect. Specifically, the district court found that "there is simply no evidence of discriminatory purpose," and the Act "regulates evenhandedly by treating in-state and out-of-state interests the same." App. 60 n.16, 62. Nevertheless, the district court concluded that the Act's limits on corporate licensing violated the dormant Commerce Clause on the ground that the

burden on interstate commerce exceeded the putative local benefits. App. 63-69.

The Court of Appeals for the Fourth Circuit affirmed the district court's denial of the equal protection and due process claims, App. 4, 24-28, and the petitioners do not seek further review of that portion of the rulings below. The court of appeals reversed the district court's decision as to the dormant Commerce Clause claim. App. 4, 11-24. Noting that the plaintiffs advanced "no contention" that "the Morticians Act discriminates against interstate commerce," App. 13, the court of appeals conducted the balancing analysis set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). App. 13-24. The court of appeals concluded that the Act "does not violate the dormant Commerce Clause" because it "does not place a barrier or burden on the flow of interstate commerce," and any arguable "incidental burden would not be excessive in light of the putative benefits from the Act's regulation." App. 21.

Regulation of the Funeral Profession in Maryland

The State of Maryland has regulated the funeral profession since 1902, when the General Assembly created the State Board of Undertakers, required licensing of undertakers, and specified the criteria for obtaining such a license. *See* 1902 Md. Laws, ch. 160. Though the original legislation applied only in Baltimore City, statewide licensing requirements were established by 1910. *See* 1904 Md. Laws, ch. 389; 1908 Md. Laws, ch. 496; 1910 Md. Laws, ch. 399. In 1924, the legislature also required that embalmers become licensed. *See* 1924 Md. Laws, ch. 575.

In the early years of regulation, Maryland law permitted corporations to be licensed as undertakers. *See* Md. Code Ann., art. 43, § 297 (1924 & Supp. 1935). In 1937, after nationwide calls for more effective regulation of the funeral industry, the General Assembly adopted various amendments that included limits on licensing of corporations. The legislation amended sections 290 through 309 of Article 43 to create the State Board of Funeral Directors and Embalmers, establish different requirements for licensing, and substitute the term "funeral director" for "undertaker." *See* 1937 Md. Laws, ch. 503. The 1937 amendments required "any person, co-partnership or corporation . . . licensed to carry on the business of Funeral Directing in the State of Maryland at the time of the passage of this Act" to register with the Board; required the Board to issue licenses to those persons and entities that registered; and provided for the annual renewal of those licenses. *Id.* The provision that is most pertinent to this case amended section 306 of Article 43 to provide as follows:

> The Board shall not hereafter issue licenses to, nor register any corporation, nor shall any corporation be permitted to conduct the business or profession of Funeral Directing which has not already been licensed and registered.

In 1945, to address the needs of servicemen and women and their families, the General Assembly authorized the Board to issue a license to any corporation that was "formed during World War II to carry on the business of any person who was licensed as a funeral director and was engaged in the business of funeral directing or embalming at the time of induction into the Armed Forces of the United States during World War II," as long as the corporation was

owned and operated by family members of the soldier. *See* 1945 Md. Laws, ch. 741.

In 1962, the legislature again revised the statutes regulating funeral directors and embalmers to create a single license for funeral directing and embalming. *See* 1962 Md. Laws, ch. 129. In 1971, upon determining that the premises used for funeral directing and embalming should also be licensed, the General Assembly created the funeral establishment license for that purpose. *See* 1971 Md. Laws, ch. 443. Under the revised statute, only licensed funeral directors and embalmers could obtain a funeral establishment license. *Id.*

Following the 1962 creation of the unified license for funeral directing and embalming, the Board issued the new unified license to some practitioners, but continued to issue funeral director licenses to others. To resolve the situation, the Act was amended in 1980 to prohibit the practice of the unified occupation of funeral directing and embalming without a license and to permit licensees who held funeral director licenses to continue to renew those licenses. *See* 1980 Md. Laws, ch. 330. In 1981, the State Board of Funeral Directors and Embalmers was renamed the State Board of Morticians. *See* 1981 Md. Laws, ch. 8, § 2. The legislation also discontinued the use of the term "embalmer" and adopted the term "mortician" as the appropriate title for licensees of the new Board. *Id.*

Today, the provisions of the Act are codified in title 7 of the Health Occupations Article ("Health Occ.") of the Maryland Code. The express purpose of the Act and each of its provisions is the protection of the health and welfare of the public. *See* Md. Code Ann., Health Occ. § 7-103. To accomplish that purpose, the Act establishes a State Board of

Morticians and Funeral Directors (the "Board"), which consists of 11 members, including six licensed morticians or funeral directors and five consumer members who are not employed by or affiliated with the funeral industry. Health Occ. §§ 7-202(a), 7-202(d). The Board has responsibility for licensing morticians, funeral directors, and funeral establishments; investigating alleged violations of the Act; enforcing the provisions of the Act; inspecting licensed funeral establishments; and establishing standards for the practice of mortuary science. *See* Health Occ. §§ 7-201, 7-205.

The Act defines four principal types of license: mortician, funeral director, apprentice, and funeral establishment. *See* Health Occ. §§ 7-302, 7-306, 7-310. To become a licensed mortician or funeral director, an applicant must complete an apprenticeship and appropriate education courses, pass written national and state examinations, and pass a practical examination. *See* Health Occ. § 7-303. Section 7-306 lists the requirements for an apprentice license, and § 7-310 provides that only a licensed funeral director or mortician may obtain a funeral establishment license. The requirements for a licensed funeral establishment are further specified in the Board's regulation promulgated as Code of Maryland Regulations ("COMAR") 10.29.03.04. One other type of license, a corporation license, is available only to those entities that held such a license before the legislature changed the licensing law to prohibit the issuance of new licenses to corporations. *See* Health Occ. § 7-309.

The Petitioners' Efforts to Secure Passage of Legislation to Expand Corporate Licensing in the Funeral Profession

Petitioners Charles Brown and Gail Manuel each own a cemetery in Maryland, but neither is a licensed mortician. App. 6-7. Petitioners Brian Chisholm and Joseph Jenkins are licensed morticians, each of whom owns his own funeral home business in Maryland. *Id.* Mr. Chisholm is the only plaintiff who does not reside in Maryland. Mr. Chisholm runs his Maryland funeral business from his home in Florida. *Id.* Each of the petitioners has expressed a desire to form a corporation and to effect a merger between an existing funeral home business and a cemetery. *Id.*

In 1996, the Maryland General Assembly created the Task Force to Examine the State's Cemetery and Funeral Industry. *See* 1996 Md. Laws, ch. 209. Petitioners Charles Brown and Joseph Jenkins were both members of the Task Force. *Id.* The Task Force's final report included a recommendation that corporations be permitted to practice mortuary science in Maryland. *Id.*

Every year from 1997 through 2005, legislation was introduced to permit the issuance of some additional corporate licenses. Petitioners Brown, Jenkins, and Chisholm lobbied or testified in favor of each of these bills.

In recent years, the legislature has considered and rejected at least thirteen such bills, each of which took a slightly different approach to amending the statute. *See* 2004 Session, S.B. 340; 2004 Session, H.B. 795, H.B. 1341; 2003 Session, H.B. 956; 2002 Session, H.B. 1113; 2001 Session, H.B. 1036; 2001 Session, H.B. 1464; 2000 Session, H.B.188, H.B. 503;

1999 Session, H.B. 107, H.B. 475; 1998 Session, H.B. 591; 1997 Session, H.B. 1321.

Recent Maryland Legislation Addressing the Funeral Profession

Although the legislature has declined to relax licensing requirements in the manner favored by the petitioners, in 2007 the General Assembly revised those requirements to establish the funeral director license. *See* 2007 Md. Laws, chs. 185, 186. This license category was added to accommodate professionals who, for religious or personal reasons, prefer not to be trained or licensed to embalm bodies. The adoption of the funeral director license also benefits out-of-state funeral directors who are not trained in embalming, by enabling them to become licensed in Maryland. The General Assembly also has responded to constituent concerns by enacting recent legislation to create a guarantee fund for all pre-need contracts, as a means of protecting consumers from sharp practices in the funeral home industry. *See* 2008 Md. Laws, ch. 532.

The Current Makeup of the Funeral Profession in Maryland

As of April 24, 2007, there were 870 active mortician licenses, 17 active funeral director licenses, and 283 funeral establishment licenses issued by the Board of Morticians. App. 37. Of those 283 funeral establishment licenses, 11 were held by surviving spouse licensees, 214 were held by licensed morticians or funeral directors, and 58 were held by corporate licensees. *Id.* Thirty of the 58 corporate licenses were owned by publicly held corporations and national chains, and 28 were privately held by Maryland corporations. App. 6.

REASONS FOR DENYING THE WRIT

THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

A. The Court of Appeals' Decision Does Not Conflict With Any Decision of Another Federal Court of Appeals or State Court of Last Resort.

Further review of this case is unwarranted because the petition does not identify any decision of another federal court of appeals or a state court of last resort that actually conflicts with the conclusion reached by the Fourth Circuit Court of Appeals in this matter. Though laws limiting professional licenses to individual licensees, rather than corporations, are typical of licensing schemes for lawyers, physicians, and other professions throughout the various States, the petition does not cite a single decision of a federal appellate court or a state high court disagreeing with the Fourth Circuit's holding that such an individual licensing requirement does not offend the dormant Commerce Clause.

The purported split of authority suggested by the petitioners is not a genuine conflict. Differences among the multiple appellate decisions cited in the petition are primarily attributable to the respective courts' application of established constitutional principles to widely divergent facts and diverse regulatory schemes.[1] Of the supposedly conflicting

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[1] For example, among the disparate circumstances and regulatory schemes addressed in the cases cited by the petitioners are a State law preventing automobile manufacturers from owning

decisions cited in part I of the petition, only one found a dormant Commerce Clause violation, *Gov't Suppliers Consol. Servs., Inc. v. Bayh*, 975 F.2d 1267, 1279 (7th Cir. 1992). Unlike this case, in which the challenged statute is conceded to be nondiscriminatory, *Gov't Suppliers* involved a waste-hauling regulation that was found to "discriminate in

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dealerships, *Ford Motor Co. v. Texas Dep't of Transportation*, 264 F.3d 493 (5th Cir. 2001)(rejecting dormant Commerce Clause challenge on the ground that plaintiff failed to show either discrimination or any actual burden on interstate commerce); a State law preventing insurance companies from affiliating with savings and loans, *Ford Motor Co. v. Muir*, 874 F.2d 926 (3d Cir. 1989)(same); a local ordinance requiring scrap metal dealers to "tag and hold" scrap metal for a 10-day period, *Tenn. Scrap Recyclers Ass'n v. Bredesen*, 556 F.3d 442 (6th Cir. 2009) (same); a State statute requiring that attorneys who act as trustees with respect to in-state real property must maintain an office in the State, *Kleinsmith v. Shurtleff*, 571 F.3d 1033 (10th Cir. 2009)(same); a State statute requiring automobiles sold or leased in state to have a "bumper quality label" stating the results of impact tests, *Ass'n of Int'l Auto. Manufrs, Inc. v. Abrams*, 84 F.3d 602 (2d Cir. 1996)(remanding on the ground that factual dispute precluded summary judgment); a State statute limiting the number of other items that may be hauled in trucks used to haul municipal waste, *Gov't Suppliers Consol. Servs., Inc. v. Bayh*, 975 F.2d 1267 (7th Cir. 1992) (finding a dormant Commerce Clause violation because the statute had a direct, discriminatory effect on interstate commerce).

practical effect against interstate commerce," and, therefore, was "subject to the higher level of scrutiny" required for discriminatory regulations. *Id.* at 1279. *See Dep't of Revenue of Ky. v. Davis*, 128 S. Ct. 1801, 1808 (2008) (a "discriminatory law is 'virtually *per se* invalid'")(citation omitted).

At most, the petition adumbrates some possible variation in language or emphasis in the cited opinions, but these do not amount to a conflict that is outcome determinative. Notably absent from the petition is any discussion of appellate court decisions that have either acknowledged or discussed the supposed split of authority described in the petition. The absence of such an illuminating discourse in the appellate case law indicates that the purported conflict remains, at most, an inchoate difference of approach that has not percolated sufficiently to warrant this Court's review at this time.

B. The Court of Appeals' Decision Does Not Conflict With Any Relevant Decision of This Court.

Nor does the petition purport to show that the holding of the court of appeals below conflicts with the holding in any relevant decision of this Court. On the contrary, the petition faults the court of appeals for *adhering* to this Court's precedents. *Compare* Petition at 14 (criticizing this Court's decision in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), and its application of *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978)) *with* court of appeals' decision at App. 16, 18-19, 22 (applying *Exxon*, 437 U.S. at 126-28, and *CTS Corp.*, 481 U.S. at 93). The "confusion" that petitioners purport to find in these precedents, Petition at 12, 14, is belied by this Court's recent case law, which indicates no such doubt as to their meaning or proper application. *See*

United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Auth'y, 550 U.S. 330, 344 (2007)(quoting *Exxon*, 437 U.S. at 127, for the proposition that the "Commerce Clause does not protect 'the particular structure of method of operation' of a market"). As the petition itself acknowledges, the decision in this case does not conflict with the holding of the other Supreme Court decision cited by the petitioners, *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27 (1980). *See* Petition at 10 (acknowledging that "*Lewis* did not expressly hold" the proposition for which the petitioners cite it, *i.e.* "that interstate investment capital and professional expertise are articles of commerce").

C. The Court of Appeals Properly Applied Established Principles Governing Commerce Clause Challenges.

Thus, as the petition effectively confirms, the court of appeals followed this Court's precedents in determining that Maryland's Morticians and Funeral Directors Act does not violate the dormant Commerce Clause. *See* App. 11-14 (citing *Dennis v. Higgins*, 498 U.S. 439, 447 (1991); *Healy v. Beer Inst.*, 491 U.S. 324, 326 n.1 (1989); *Dep't of Revenue of Ky. v. Davis*, 128 S. Ct. at 1808; *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949); *Oregon Waste Sys., Inc. v. Dep't of Envrt'l Quality of Oregon*, 511 U.S. 93, 98 (1994); *Pike v. Bruce Church, Inc.*, 397 U.S. at 142).

The court of appeals first observed that the Act does not "purport to regulate activity outside Maryland." App. 14. The court then determined that the Act does not discriminate against interstate commerce because it "does not treat persons from out-of-state any differently than persons in-state," and the Act permits those corporate licenses that are

authorized to be owned by "any person or corporation, out-of-state or in-state," including "publicly-held out-of-state corporations." App. 15. The petition does not challenge any of these portions of the court of appeals' ruling.

The court of appeals then determined that the Act does not unjustifiably burden interstate commerce because the Act's limits on corporate licensing address only "'the particular structure or methods of operation in a retail market'" and do not "'prohibit the flow of interstate goods, place added costs upon them,'" or otherwise affect "the flow of articles of commerce across state lines." App. 16, 19 (quoting *Exxon*, 437 U.S. at 127, 126). The court concluded that, even if the Act were deemed to place some incidental burden on commerce, that incidental burden "is not excessive and is justified by the very real benefits of protecting the public health, safety, and welfare by encouraging familiarity of the owner of a funeral business with the day-to-day workings of that business and creating accountability to regulators and to clients." App. 23-24.

To support this conclusion, the court of appeals noted that "promoting familiarity between an owner and his business in a licensed and regulated industry" has been recognized by this Court as "a legitimate local interest." App. 22 (citing *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 166-67 (1973)). The court of appeals also cited this Court's finding that a State "'has a substantial interest in preventing the corporate form from becoming a shield for unfair business dealing.'" App. 22 (quoting *CTS Corp.*, 481 U.S. at 93). To further demonstrate that the Act's general insistence on individual rather than corporate licensing "provides individual liability and therefore more direct accountability for owners of funeral

establishments," the court of appeals quoted from the plaintiffs' own statement that "they desire to use the corporate form because they 'want to be insulated from personal liability for . . . negligence.'" App. 23.

Therefore, the court of appeals applied established precedent to reach a reasonable conclusion that does not warrant the exercise of this Court's discretionary review.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

DOUGLAS F. GANSLER
Attorney General of Maryland

STEVEN M. SULLIVAN*
KATHLEEN A. ELLIS
GRANT D. GERBER
Assistant Attorneys General
200 St. Paul Place
Baltimore, Maryland 21202
(410) 576-6324

Attorneys for Respondents

* *Counsel of Record*

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